In the High Court of Judicature at Madras

Dated: 23/04/2003

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The Honourable Mr.Justice R.Jayasimha Babu
and
The Honourable Mr.Justice N.V.Balasubramanian

Letters Patent Appeal No.61 of 1996

1.Rahmath Ummal
2.Salma Ummal
3.Jannathunnisa ..... Appellants

-Vs-

1.S.Mohammed Ibrahim (died)
2.M.Habusa Ummal
3.M.Syed Hameedu Basha
4.M.Sellakani ..... Respondents

(R2 to R4 impleaded as L.Rs. Of R1
as per order dated 14.11.2002 in
CMPs. No.10798 to 10800 of 2002

Letters Patent Appeal filed under Clause 15 of Letters Patent against the judgment and decree dated 21.07.1994 made in A.S. No.403 of 198 3 by a learned single Judge of this Court confirming the judgment and decree dated 26.03.1983 made in O.S. No.45 of 1982 on the file of the Additional District Judge, Pondicherry.

!For appellants : Mr.K.V.Subramanian

^For respondents : Mr.K.Yamunan

:JUDGMENT

R.Jayasimha Babu, J.

This appeal arises from a suit which was instituted on the first of October 1981 on the strength of a sale deed in favour of the plaintiff executed on 23.11.1967 by a vendor whose title is traced to a sale deed dated 20.01.1966 and which document had been executed not by the owner of the property conveyed under the deed but, by a person describing himself as the holder of a power of attorney executed by the owner in Indonesia on 04.09.1962. Neither the original nor a certified copy of the power of attorney was produced by the plaintiff despite the fact that the execution of

such a document by the owner of that property, namely an undivided share in two houses in Karaikal, had been put in issue by the defendants in the suit.

2. The trial Court as also the learned single Judge having granted decree declaring the plaintiff's title and directing partition and separate possession despite that lacuna, the defendants are in appeal before us.

3. The property claimed to have been purchased by the plaintiff who is a real estate broker and a document writer, and which purchase is described by the defendants as speculative, was of undivided shares in two properties described in the plaint schedule 6/10th share of the house in 'A' schedule and 1/5th share in the house described in ' B' schedule. Those shares were the shares belonging to one Mohammed Yusuf who had inherited the properties of his mother Fathima. Fathima died on 23.05.1947. Fathima had received a half share in the plaint 'A' schedule property in terms of a Court decree in the year 1943, The other half belonged to her father. After her father's demise, in addition to her share she received 1/5th share in father's half share. In the 'B' schedule property she had, according to plaintiff, received a gift from Fathima's father's sister Katheeja. The remaining part of that plaint 'B' schedule had belonged to her father. After his demise she had become entitled to 1/5th share in the portion belonging to her father.

4. It is the admitted case of the parties that Yusuf left India for Java sometime prior to 1949 and never came back. According to the plaintiff he died in Java in 1974. No letters written by the said Yusuf to anyone in India has been produced to show his whereabouts in Indonesia and as to how long he lived there. On 04.09.1962 according to the plaintiff, Yusuf executed a power of attorney in favour of Sulthan Arif Marakair before a Notary at Makasa, Indonesia which document was brought into India by Sultan Arif and registered at Karaikal on 16.11.1962. On the strength of that document Sulthan Arif tried to secure possession of the property from the two step sisters of Yusuf's mother Fathima and her aunt Katheeja, who were in possession of the property having lived there all their lives. That attempt was unsuccessful.

5. On 19.09.1964 Katheeja filed Affair No.302/1965 in the Court of First Instance at Karaikkal impleading Yusuf and seeking a declaration that the gift said to have been executed by her in 1929 in favour of Fathima was void. Sulthan Arif Marikair having persisted in his attempts at dislodging Katheeja and her two nieces Rahmath and Salma, she instituted Affair No.98/1966 and obtained an order on 10.09.1966 that she was not to be dispossessed and leaving the matter open for decision by the Civil Court. Even before that, Sulthan Arif filed a suit on 26.06.1965 which suit was later renumbered as O.S. No.33 of 19 68 before the District Munsif, Karaikal for partition of the properties and for possession. In that suit he had impleaded Rahmath and Salma and their brother Mohideen who had left for Java sometime prior to 1947 and who had not been heard off since then. During the pendency of that suit he purporting to act on the strength of the power of attorney, sold the undivided share of Yusuf to one Hammed Ummal on 20 .01.1966. She was also impleaded as a party in the suit.

6. In the suit in O.S. No.33 of 1968 Sulthan Arif was examined as a witness. He disclaimed knowledge of anything concerning that suit, but merely asserted that he had executed the sale deed in favour of Hameeda, who had also filed a written statement in the suit. That suit was ultimately dismissed on 25.03.1971.

7. Hameeda appears to have created two mortgages on the strength of the sale deed dated 20.01.1966 even though she never took possession of the property. One of the mortgagees got an order of attachment of the property on 16.12.1976. Rahmath and Salma thereafter filed a suit in O.S. No.14 of 1977 in which Hameeda was one of the defendants. That suit was decreed in their favour on 31.10.1979 declaring that the attachment was invalid.

8. The present plaintiff entered the scene on 23.11.1967 under a document which is described as sale-cum-mortgage. He did not choose to participate in any of the proceedings except to give evidence in O. S. No.14 of 1977. The suit in O.S. No.45 of 1982 on the file of District Judge, Pondicherry, from which this appeal arises was filed some two years after O.S. No.14 of 1977 was decreed.

9. The gift that Katheeja had allegedly executed in favour of Yusuf's mother Fathima was held to be invalid by the learned District Judge in Appeal 204 of 1967 filed against the judgment in Affair No.302 of 1965. It was further held therein that it was for the alleged donee or her successor to establish that she had been put in possession at the time of the alleged gift. No such proof was adduced by any one thereafter.

10. In the suit filed by respondent in this appeal, Mohammed Ibrahim, the plaintiff, he did not produce the power of attorney that is said to have been executed by Yusuf on 04.09.1962 despite it's very existence having been disputed. Though he claimed that the document had been registered, not even a certified copy was filed.

11. In a suit for declaration of title the burden is on the plaintiff to establish the title. There is no room for making assumptions in favour of the plaintiff merely because a document is drawn up by a Notary. When the existence of that document is disputed, it is the duty of the plaintiff to produce the same and if he is not in custody of the same, to cause production of the same from the person who has the custody. The plaintiff did not claim that he had custody nor did he take steps to have the document produced from the custody of anyone else who allegedly had custody. As the title of the plaintiff is sought to be traced to Yusuf and Yusuf himself is not a signatory to the sale deed in favour of the plaintiff's vendor, the power of attorney is an essential link in the chain, and it's non production in the circumstances, is fatal to the plaintiff's case.

12. The power of attorney is a crucial document without which it is

not possible to hold that Yusuf's interest in the property had been validly transferred to the plaintiff's vendor. That the plaintiff' s purchase of the property was speculative is also evident from the fact that the power agent so called had made repeated attempts to secure possession and failed. Thereafter, the person in whose favour he executed the sale deed made numerous attempts over more than two decades and was unsuccessful. The plaintiff had clearly purchased litigation and was seeking to dislodge the blood relatives of Yusuf from the property even though Yusuf himself never returned to India from Java and had not by any communication or any other act asserted his rights therein or seek to transfer his interest in the properties to anyone.

13. The trial Court as also the learned single Judge had merely acted on the reference to the Power of Attorney in the sale deed in favour of Hameeda and assumed that it exists, with further assumption that it had been duly executed by Yusuf. There was no warrant for making such large scale assumptions in favour of the plaintiff.

14. Learned counsel for the respondent invited our attention to the judgment of this Court in the case of Mourougaessa Modealiar v. Aguilandammalle, 1995-1-LW 72 which pointed out the importance of notary in the French Legal system, the law that prevailed in Karaikal, Mahe and Pondicherry at the relevant time being French law, and the presumption that could be made that acts done by him are in good faith. The question here is not one of good faith but one of proof. The document which is essential for proving the title of the plaintiff has not been produced. Admittedly the defendants have been in possession from atleast 1947 when even according to the plaintiff, Yusuf left India. Admittedly Yusuf did not come back to India and even according to the plaintiff Yusuf died in 1974. A suit filed in the name of Yusuf in 1968 had been dismissed as early as on 25.03.1971. The plaintiff himself had given evidence in O.S. No.14 of 1977 filed by the defendants in the suit and the suit filed by the defendants had been decreed. The title of plaintiff's vendor had been negatived in O. S. No.14 of 1977. The finding recorded therein would bind the plaintiff here also as his vendor was a party to that suit and the question of title to the property was in issue in that suit. Even according to the plaintiff his purchase was subject to the result of the litigation.

15. The appeal succeeds. The judgment under appeal is set aside and the suit in O.S. No.45 of 1982 is dismissed. CMP. No.4980 of 1996 is closed.

Index : Yes
Website : Yes

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